Office - Supreme Court, U. S.
FILED
OCT 9 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941

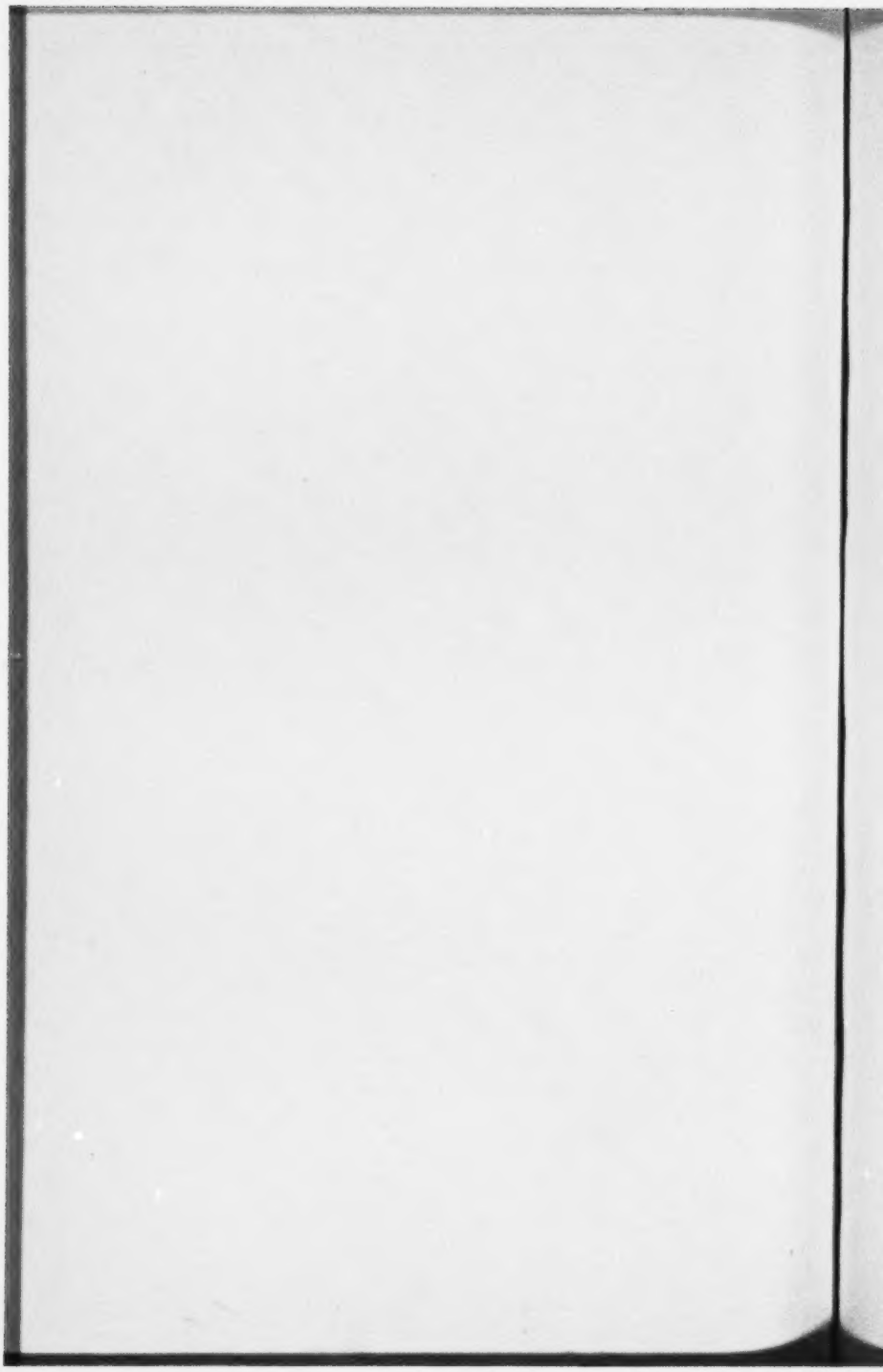
No. 690

PAUL PATTERSON, ET UX.,
Petitioners,

vs.

W. E. PEEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS



INDEX

		Page
I.	QUESTIONS PRESENTED	2
II.	STATUTORY PROVISIONS SUSTAINING JURISDICTION	2
III.	PROVISION OF CONSTITUTION INVOLVED	3
VI.	DATE OF JUDGMENT AND DATE OF PRESENTATION OF PETITION FOR CERTIORARI	4
V.	SUMMARY STATEMENT OF THE MATTER INVOLVED	5
VI.	NATURE OF THE RULINGS OF THE STATE COURT BRINGING THE CAUSE WITHIN THE JURISDICTION OF THIS COURT	8
VII.	STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND CASES BELIEVED TO SUSTAIN JURISDICTION	10
VIII.	REASONS FOR GRANTING THE WRIT	15

AUTHORITIES

	Pages
Baltimore & O. R. Co. vs. United States, 298 U. S. 349	14, 17
Brinkerhoff-Faris Trust & Savings Company vs. Hill, 281 U. S. 673	13
Coe vs. Armour Fertilizer Works, 237 U. S. 413	14
Creswill vs. Grand Lodge Knights of Pythias, 225 U. S. 246	11
Enterprise Irrigati[illegible] District vs. Farmers Mutual Canal Company, 2[illegible]3 U. S. 157	11
Georgia Railway & Elec. Co. vs. Decatur, 295 U. S. 165	14, 17
Iron Cliffs Co. vs. Negaunee Iron Co., 197 U. S. 463	16
McDonald vs. Humble Oil & Refining Company, 78 S. W. (2d) 1068	8
Postal Telegraph-Cable Company vs. Newport, 247 U. S. 464	11, 16
State, et al., vs. Humble Oil & Refining Company, et al., 128 S. W. (2d) 424	7, 8, 9, 10, 15
Article 5509, Revised Civil Statutes of Texas, 1925	19

IN THE

Supreme Court of the United States

October Term, 1941

No._____

PAUL PATTERSON, ET UX.,
Petitioners,

VS.

W. E. PEEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Paul Patterson and Mrs. Paul Patterson for a Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, Beaumont, Texas, respectfully shows to this Honorable Court:

I.

QUESTIONS PRESENTED

This suit is an action brought by Respondent against Petitioners to recover title to and possession of land. Petitioners' claim of title and right of possession depends upon the location of Washington County Railroad Company Survey No. 13 in Montgomery County, Texas. The questions presented are:

(a) Were Petitioners denied, in this case, due process of law in violation of the guaranties of the 14th amendment to the Constitution of the United States, by the Court of Civil Appeals, holding Petitioners bound with respect to the location of the Washington County Railroad Company Survey No. 13 and Evantha Scurry Surveys by the judgment entered in another case to which Petitioners were not parties and under which Petitioners do not claim?

(b) Were Petitioners denied, in this case, due process of law in violation of the 14th amendment to the Constitution of the United States by the Court of Civil Appeals refusing to consider the evidence offered by Petitioners to show the location of Washington County Railroad Company Survey No. 13 in Montgomery County, Texas?

II.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

This Court has jurisdiction to review by certiorari the judgment of the Court of Civil Appeals for the

Ninth Supreme Judicial District of Texas under Section 237 of the Judicial Code as amended (U. S. C. A., Title 28, Section 344) which provides that:

> "(b) It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

III.

PROVISION OF CONSTITUTION INVOLVED

The provision of the Fourteenth Amendment to the Constitution of the United States, under which Petitioners specially set up and claim rights, privileges and immunities, reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

IV.

DATE OF JUDGMENT AND DATE OF PRESENTATION OF PETITION FOR CERTIORARI

The judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas sought to be reviewed herein was entered on February 13, 1941 (R., 39). Petitioners' Motion for Rehearing was filed in the said Court of Civil Appeals within fifteen days as authorized by Article 1877, Revised Civil Statutes of Texas, 1925 (R., 40, 51). This motion was entertained by the Court of Civil Appeals and overruled on Apirl 2, 1941 (R., 52). Thereupon, within the time allowed by applicable state statute (Article 1742, Revised Civil Statutes of Texas, 1925), Petitioners petitioned the Supreme Court of Texas to grant a writ of error and review the judgment of the Court of Civil Appeals (R., 53-64). The Petition for Writ of Error was refused by the Supreme Court of Texas on June 11, 1941 (R., 84). The Petitioners thereupon within fifteen days, as authorized by Rule 4 of the rules of the Supreme Court of Texas, filed their Motion for Rehearing of the Application for Writ of Error (R., 65-83). This motion was entertained by the Supreme Court of Texas and was overruled on July 9, 1941 (R., 84), whereupon the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, here sought to be reviewed, became final under state law.

The said Court of Civil Appeals has possession of the record in this cause and is the "highest Court of the state in which a decision in the suit could be had."

The date on which this Petition for Certiorari is presented is October 7, 1941.

V.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This suit was instituted by Respondent in the District Court for the Ninth Judicial District of Texas, Montgomery County, Texas, as an action in trespass to try title to recover title to and possession of 522.5 acres of land described in Repondent's petition (R., 3-6). Petitioners answered by plea of not guilty, and disclaimer except as to the land described in Respondent's petition in conflict with a 282-acre tract, as to which Petitioners plead not guilty (R., 8). The case was tried before a jury and submitted on special issues, and upon the jury's verdict and facts found by the Court, not found by the jury (R., 23-28), judgment was rendered by the trial Court for Respondent against Petitioners (R., 23).

Respondent alleged and contended that the 522.5 acres of land was the Evantha Scurry Survey as surveyed by L. Burns on November 11, 1898 (R., 3), and patented December 2, 1898 (R., 21).

It was Petitioners' contention that the senior Washington County Railroad Company Survey No. 13, as surveyed by John M. Wade in 1861 (R., 9), and patented April 3, 1877 (R., 11), adjoins, by its calls and by course and distance, the East lines of

the L. B. Weeden (Owens) Survey, patented April 15, 1851 (R., 15), and John A. Davis 1280-acre survey, patented November 15, 1850 (R., 17), and the South line of the Wm. B. Bridges Survey, calling for the same three witness trees at its Northwest corner as described at the Southwest corner of the Wm. B. Bridges Survey in its patent dated April 21, 1849 (R., 13); that the Evantha Scurry Survey, as patented December 2, 1898 (R., 21-22), is entirely North of Washington County Railroad Company Survey No. 13, as patented April 3, 1877 (R., 11), and conflicts with the Wm. B. Bridges Survey, as patented April 21, 1849; that the 522.5 acres described in Respondent's petition (R., 3) conflicts with the Northern part of Washington County Railroad Company Survey No. 13 (R., 9) and conflicts with the land deeded to Petitioners as a part of Washington County Railroad Company Survey No. 13 (R., 11) that Respondent's record title does not cover the 522.5-acre tract described in his petition and that he did not have title by limitation because of the occupancy of T. E. McDonald, grantor in Petitioners' deed, a record owner in the senior Washington County Railroad Company Survey No. 13; and that if it could be determined that any part of the Scurry Survey was in conflict with the senior Washington County Railroad Company Survey No. 13, the junior Scurry Survey and patent were void to the extent of such conflict.

Petitioners further contended that there was no finding by the jury fixing the disputed location of the South boundary line of the Evantha Scurry Survey nor the North boundary line of Washington

County Railroad Company Survey No. 13 (R., 23-26) and that there was no finding by the jury to support the judgment of the trial Court fixing the ground location of the Southeast corner of the Scurry Survey.

Petitioners appealed the cause to the Court of Civil Appeals for the Ninth Supreme Judical District of Texas, which Court affirmed the judgment of the trial Court (R., 34-39) by holding in its opinion (R., 34-38) that the findings in the case of *State, et al., vs. Humble Oil & Refining Company, et al.* (Tex. Civ. App., opinion dated April 5, 1939), 128 S. W. (2d) 424, writ of error refused by the Supreme Court of Texas, were binding, as a matter of law, upon Petitioners (who were neither parties to nor in privity with the judgment in that case), on the principles of *stare decisis*, and refused to consider the evidence introduced in the case at bar supporting Petitioners' contention as to the location of the surveys in question (R., 35). Based upon this theory, the Court of Civil Appeals, without reviewing the evidence, held that no part of the land sued for is on the Washington County Railroad Company Survey No. 13 in upholding the jury's finding on the issue of five years limitation in favor of Respondent (R., 34-38).

The only written opinion delivered in the State Courts is that of the Court of Civil Appeals (R., 34-38), which is unofficially reported in 149 S. W. (2d) 284.

VI.

NATURE OF THE RULINGS OF THE STATE COURT BRINGING THE CAUSE WITHIN THE JURISDICTION OF THIS COURT

(Under this heading also will be shown when and how the federal question sought to be reviewed was raised; the method of raising it; and the way in which it was passed upon by the State Court.)

The federal question sought to be reviewed herein arose in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas upon its refusal to consider the evidence introduced by Petitioners in this case supporting Petitioners' assignment of error attacking the verdict of the jury and the action of the trial Court in finding facts necessary to support its judgment not found by the jury nor supported by the evidence, upon the theory that the location of the surveys in question by the judgment, based upon findings of a jury, in the case of *State, et al., vs. Humble Oil & Refining Company, et al.* (Tex. Civ. App., opinion dated April 5, 1939, rehearing denied May 3, 1939), 128 S. W. (2d) 424, writ of error refused by the Supreme Court of Texas, were binding, as a matter of law, upon Petitioners (who were neither parties to nor in privity with the Judgment in that case) on the principles of *stare decisis* (R., 35); and in holding, in support of this theory, that in the case of *McDonald vs. Humble Oil & Refining Company*, 78 S. W. (2d) 1068 (to which Petitioners were neither parties nor privies), the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, had before it the very issues

on the location of corners and lines of the Bridges, Littlefield and the Washington County Railroad Company Survey No. 13 in controversy in the case at bar.

Predicated upon the holding that the judgment in *State, et al., vs. Humble Oil & Refining Company, et al., supra,* was binding upon Petitioners as a matter of law, the Court of Civil Appeals held that Petitioners' deed to a part of Washington County Railroad Company Survey No. 13 conveyed to them no interest in the land in controversy; that the land in controversy was the Scurry Survey; that Petitioners' possession was that of naked trespassers. Upon the theory that the location of the surveys in question were fixed by the findings in the case of *State, et al., vs. Humble Oil & Refining Company, et al., supra,* and that the judgment in that case was binding upon Petitioners, the Court of Civil Appeals affirmed the judgment of the trial Court by sustaining the finding of the jury on the issue of five years limitation in favor of Respondent (R., 34-38).

These rulings of the Court of Civil Appeals were duly assigned as errors in Petitioners' Motion for Rehearing (R.,41-43), which Motion for Rehearing was overruled (R., 52). The rulings were then complained of in the Application for Writ of Error filed in the Supreme Court of Texas (R., 58-61), the Application for Writ of Error being refused (R., 84). The same rulings were complained of in Petitioners' Motion for Rehearing filed in the Supreme Court of Texas (R., 81-82), which motion was by that Court overruled.

VII.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND CASES BELIEVED TO SUSTAIN JURISDICTION

The holdings of the Court of Civil Appeals on non-federal questions to support the judgment of the trial Court are so interwoven and dependent upon the holding that Petitioners are bound by the judgment in the case of *State, et al., vs. Humble Oil & Refining Company, supra*, and the refusal of the Court of Civil Appeals to review (consider) the evidence supporting Petitioners' contention in the case at bar, that Petitioners have been denied a hearing and their property has been taken without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. We believe the very opinion of the Court of Civil Appeals presents two substantial federal questions, of which the Supreme Court of the United States has jurisdiction.

It appears from the opinion of the Court of Civil Appeals (R., 36) that the Court's upholding Respondent's recovery under the Texas five-year statute of limitation (copied in the appendix) was founded upon the holding that the location of Washington County Railroad Company Survey No. 13 and Evantha Scurry were fixed by the judgment in the case of *State, et al., vs. Humble Oil & Refining Company, et al., supra*, and that the findings in that case were binding upon Petitioners on principles of stare decisis.

In *Creswill vs. Grand Lodge Knights of Pythias*, 225 U. S. 246, 264, this court held:

> * * * "that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

In *Enterprise Irrigation District vs. Farmers Mutual Canal Company*, 243 U. S. 157, 166, this Court said:

> "But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

In *Postal Telegraph-Cable Company v. Newport*, 247 U. S. 464, 476, this Court held:

> "Res judicata, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon the ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of law, in this case, independent of the Federal questions: and (b) Is the decision reached upon that

point sufficiently well founded to furnish adequate support for the judgment? Eustis v. Bolles, 150 U. S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; Southern P. Co. v. Schuyler, 227 U. S. 601, 610, 57 L. ed. 662, 668, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co., 243 U. S. 157, 164, 61 L. ed. 644, 648, 37 Sup. Ct. Rep. 318.

Waiving the doubt whether, under the particular facts of this case, the question of res judicata can be regarded as independent of the Federal questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill-founded that it cannot sustain the judgment; and this for the reason that it is inconsistent with another Federal right of defendant, fundamental in character.

The doctrine of res judicata rests at botton upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; Greenl. Ev. Secs. 522, 523. The opportunity to be heard is an essential requisite of due process of law in judicial preceedings. Windson v. McVeigh, 93 U. S. 274, 277, 23 L. ed. 914, 915; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; Simon v. Craft, 182, U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836. And as a state may not, consistently with the 14th Amendment, enforce a judgment against a party

named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Scott v. McNeal, 154 U. S. 34, 46, 38, L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423, 59 L. ed. 1027, 1031, 35 Sup. Ct. Rep. 625), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

Again in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S. 673, 682, this Court in reversing the judgment of the Supreme Court of the State of Missouri on Writ of Certiorari held:

"But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

"The court's finding of laches was predicated entirely on the plaintiff's failure to apply to the state tax commission. In view of what we have said, this ground is not sufficient independently to support the judgment. And, as the Supreme Court of Missouri did not decide whether the allega-

> tions of the plaintiff's bill were sustained by the proof, we do not inquire into the merits of the plaintiff's claim under the equal protection clause."

In *Baltimore & O. R. Company v. United States*, 298 U. S. 349, 391, the Court said:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to inroduce evidence and have judicial findings based upon it."

In *Georgia Railway & Electric Company v. Decatur*, 295 U. S. 165, 174, the Court held:

> "The refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in controvention of the due process of law clause of the Constitution."

In *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 426, this Court said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

VIII.

REASONS FOR GRANTING THE WRIT

A. Petitioners' substantial rights under the Fourteenth Amendment to the Constitution of the United States were denied to them by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas in holding that the findings supporting the conclusion of a Court of Civil Appeals, in *State vs. Humble Oil & Refining Company, et al., supra,* in respect to the boundaries and corners of the Bridges, the Littlefield and the Washington County Railroad Company Survey No. 13, and other surveys in issue, were binding upon all parties to the case at bar on the principles of *stare decises,* and, upon such holdings, in refusing to review the evidence supporting Petitioners' assignments of error. Petitioners were thereby denied a hearing and their property taken without due process of law as effectively as though there had been no trial of the case.

B. The Court of Civil Appeals for the Ninth Supreme Judicial District has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, in this: The said Court of Civil Appeals has given a conclusive effect to a prior judgment in the case of *State, et al., vs. Humble Oil & Refining Company, et al., supra,* against Petitioners who were neither parties nor in privity with the judgment therein, and overruled Petitioners' exceptions to that ruling. This decision

of the Court of Civil Appeals is probably not in accord with the decision of this Court in *Postal Telegraph-Cable vs. Newport*, 247 U. S. 464, 476, or in accord with the decision of *Iron Cliffs Company vs. Negaunee Iron Company*, 197 U. S. 463, 475, in which the Court, in holding that the Pioneer Iron Company could not be affected in any way by the opinion and decision of the Supreme Court of Michigan, said:

> "It is apparent that the questions decided in the state supreme court were of a non-federal character, and give no right of review here unless it is true that in this judgment the Pioneer Iron Company has been concluded and its property rights taken without giving it an opportunity of being heard in the case. It is fundamental that no person can be deprived of property rights by any decree in a case wherein he is not a party. If it should hereafter be insisted that the rights of that company or its agents are concluded, a Federal question might arise if such effect shall be given to the decree in this action."

C. The Court of Civil Appeals for the Ninth Supreme Judicial District has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, in this: The said Court of Civil Appeals refused to review and consider the evidence supporting Petitioners' assignment of error attacking the verdict of the jury and fact findings by the trial Court and the judgment of

the trial Court bearing upon the location of the surveys in question and title to the land in controversy, and the Court of Civil Appeals has overruled Petitioners' exceptions to that ruling. This action of the Court of Civil Appeals is probably not in accord with the decisions of this Court in *Baltimore & O. R. Company vs. United States*, 298 U. S. 349, 391, or with the decision in *Georgia Railway & Electric Company vs. Decatur*, 295 U. S. 165, 174. In the latter case the Court held:

> "The refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas at Beaumont, Texas, commanding that Court to certify and send to this Court, on a day certain to be therein named, for its review and determination a full and complete transcript of the record and proceedings had in said Court, entitled and numbered on its docket No. 3809, *Paul Patterson, et ux., Appellants, vs. W. E. Peel, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States, and that the judgment of the said Court of Civil Appeals be reversed by this Court,

and for such other and further relief as to this Honorable Court may seem right and proper.

Dated this 7th day of October, 1941.

DAN MOODY,
W. P. MCCOMB,

Counsel for Petitioners

DAN MOODY,
Austin, Texas,
W. P. McCOMB,
Conroe, Texas,
Attorneys for Petitioners.

APPENDIX

Article 5509, Revised Civil Statutes of Texas, 1925. "Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article."

(16)

No. 690

FILED
DEC 15 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

PAUL PATTERSON ET UX., *Petitioners,*

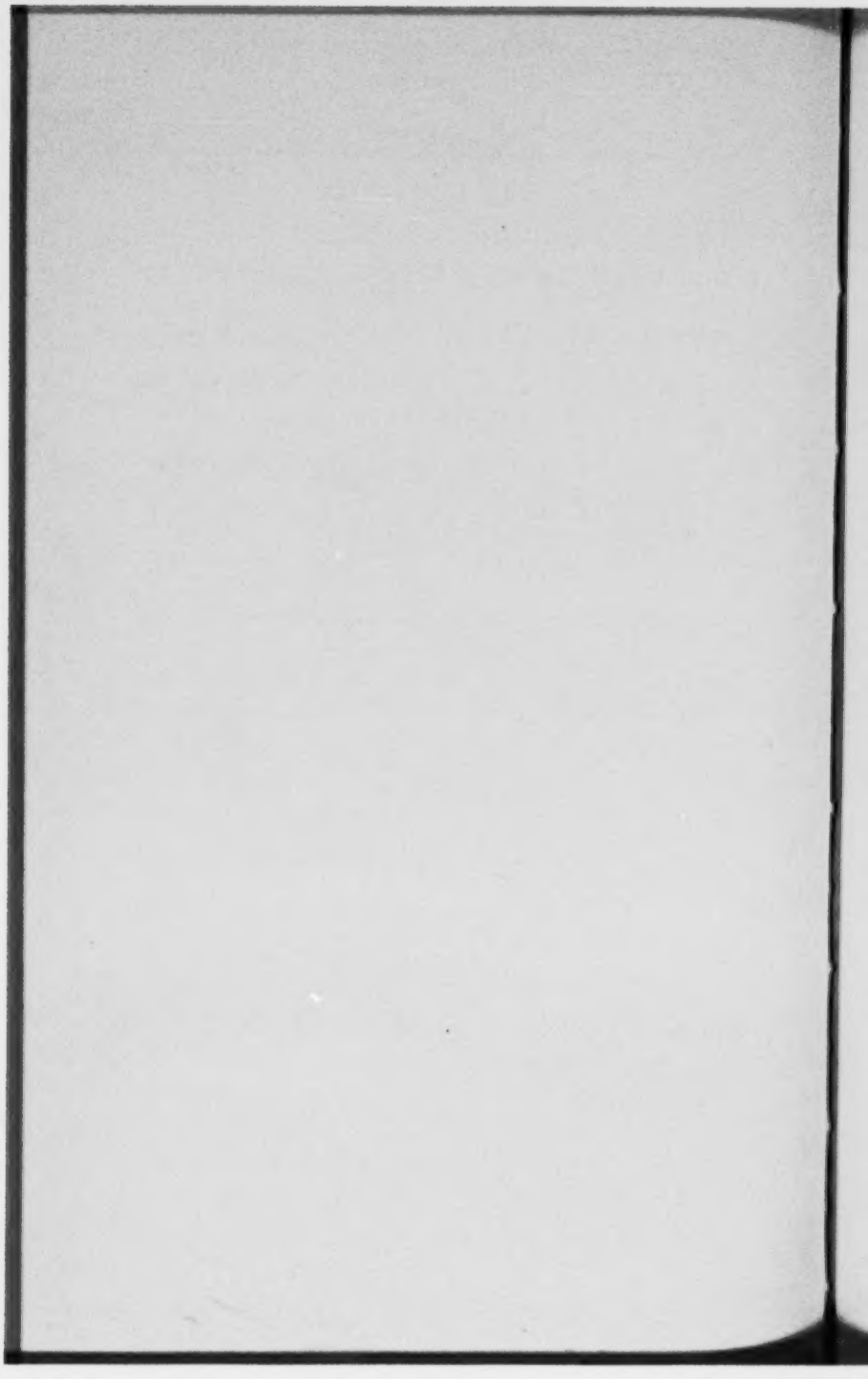
v.

W. E. PEEL, *Respondent.*

PETITION FOR REHEARING

FRED L. WILLIAMS,
DAN MOODY,
W. P. MCCOMB,
Counsel for Petitioners.

YOUNG CO., HOUSTON



AUTHORITIES

	PAGE
Coe v. Armour Fertilizer Works, 237 U. S. 413, 426	9
Dunn v. Land, 193 S. W. 698	8
Eppenauer v. Ohio Oil & Refg. Co., 78 S. W. (2d) 1068	7
Hansberry v. Lee, 311 U. S. 32, 61 Sup. Ct. 115, 85 L. Ed. 11	5, 10
Horne v. Moody, 146 S. W. (2d) 505	7
McCurdy v. Bullock, 20 S. W. (2d) 1110	3
Richards v. Smith, 67 Tex. 610, 4 S. W. 571	4
State et al. v. Humble Oil & Refg. Co. et al., 128 S. W. (2d) 424	5, 6, 7, 8
Southern Pine Lumber Co. v. Whiteman, 104 S. W. (2d) 635	2
Taylor v. Higgins Oil & Fuel Co., 2 S. W. (2d) 288	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 690

PAUL PATTERSON ET UX., *Petitioners,*
v.
W. E. PEEL, *Respondent.*

PETITION FOR REHEARING

To the Honorable Supreme Court of the United States:

Come now Paul Patterson and Mrs. Paul Patterson, ~~son~~, petitioners in the above entitled cause, and present this, their petition for rehearing of the above entitled cause, and, in support thereof, respectfully show:

That the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas resulted from proceedings in which that Court, by giving conclusive effect to the finding and judgment in a prior case to which petitioners were neither parties nor in privity with a party therein, takes petitioners' land and home in violation of the due process clause of the

Fourteenth Amendment to the Constitution of the United States.

Petitioners were in possession of the land in controversy, had constructed improvements thereon, and had occupied it as their home for a long time prior to respondent's suit in trespass to try title. (R. 45.) Petitioners have a deed to the land as a part of Washington County Railroad Survey No. 13 (R. 25), which, by the field notes in its patent, covers the land in controversy. (R. 8.) Respondent claims the land as a part of the junior Evantha Scurry Survey. (R. 2 and 14.)

It was petitioners' contention throughout the proceedings that the junior Scurry Survey was north of Washington County Railroad Survey No. 13, and did not cover the land in controversy. (R. 22.)

The judgment of the trial court was not supported by the jury's verdict upon which it was rendered, since there were no findings in the verdict by which the ground location of the senior Washington County Railroad Survey No. 13 could be fixed (R. 16-19), and there was no evidence in the record which would have supported a finding by the jury that the senior Washington County Railroad Survey No. 13 does not cover the land in controversy (R. 21-22), and there was no finding by the jury fixing the disputed location of the south line of the junior Scurry Survey as attempted by the trial court's judgment. (R. 16-19.) Under the well established rule in Texas, the trial court's judgment could not be affirmed upon this record, as held in the case of *Southern Pine Lumber Co. v. Whiteman,* 104 S. W. (2d) 635, in which the judgment of the

rt was reversed and remanded. In that case
t said:

The verdict of the jury in this case did not it-
locate, nor furnish the means of locating, the
uted boundary line on the ground. * * *
s necessary to describe the disputed line by
rence to objects concerning which there can
o controversy and the verdict of the jury must
ce their findings with reference to such ob-
s."

ourt further said:

The conclusion stated is further compelled,
think, by the operation of the principle that
e the judgment of a court must conform to the
lict, if any, the judgment cannot include mat-
which are a part of the subject-matter upon
ch the verdict speaks, but not embraced in
verdict."

e case of *McCurdy v. Bullock,* 20 S. W. 1110,
rt applied this rule and held as follows, quot-
n the syllabus:

Where the verdict in trespass to try title is
explicit as to the location of a disputed bound-
, the judgment entered thereon, which estab-
es the boundary, is incorrect."

it was necessary for respondent, as plaintiff,
r to recover on his claim under the junior
Survey, to produce evidence and have a jury
thereon locating the senior Washington Coun-
oad Survey in a position so that it would not
ny part of the land in controversy, which he did
presents another reason that the judgment of

the trial court could not be upheld on appeal upon the record in this case, under the rule stated by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas in the case of *Taylor v. Higgins Oil & Fuel Co.,* 2 S. W. (2d) 288, as follows:

> "They were the plaintiffs in this case and can recover only upon an affirmative showing of title. That is to say, the burden rested upon them of showing a location of the west boundary line that would leave in existence the tract of land in controversy."

The validity of the trial court's judgment rested entirely upon the senior Washington County Railroad Survey No. 13 not covering any part of the land in controversy, because, to the extent that the junior Scurry Survey might conflict with a senior survey, it would invalidate, to that extent, any record title under the junior survey, and under the record in this case respondent could not have possibly matured a limitation title on account of the occupancy of petitioners and the grantor in their deed, a record owner in the senior Washington County Railroad Survey No. 13; exclusive possession being necessary in order to mature a limitation title, as held by the Supreme Court of Texas in *Richards v. Smith,* 67 Tex. 610, 4 S. W. 571, in the following language:

> "When the acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it adverse to the claim of all others, and this is accompanied by an actual possession, exclusive in its character, then limitation will run in favor of the persons so asserting adverse claim, and enjoying an exclusive possession from the

time such exclusive occupancy began, whether the land be inclosed or not."

Petitioners perfected an appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, which court, under our procedure, has authority to pass upon both law and facts and render such judgment as should have been rendered by the trial court, but the Court of Civil Appeals refused to duly consider petitioners' assignments of error attacking the judgment of the trial court, and refused to review the evidence in the record supporting these assignments because of the theory and holding of the Court of Civil Appeals that the judgment and findings in the case of *State et al. v. Humble Oil & Refining Co. et al.,* 128 S. W. (2d) 424, were binding upon petitioners on the principles of *stare decisis.* (R. 24) While it is true that the due process clause of the Fourteenth Amendment does not guarantee the right of appeal, yet when an appeal is allowed to review a judgment which cannot stand upon the record in the case and the appellate court refuses to consider the evidence and affirms the unsupported judgment by giving conclusive effect to the findings and judgment in a prior case, in which the appellant was neither a party nor in privity with a party therein, this, we believe, is a denial of due process.

The recent case of *Hansberry v. Lee,* 311 U. S. 32, 61 Sup. Ct. 115, 85 L. Ed. 11, involved the question as to whether the Supreme Court of Illinois, by its adjudication that petitioners in that case were bound by a judgment rendered in an earlier litigation to which

they were not parties, had deprived them of the due process of law guaranteed by the Fourteenth Amendment, this Honorable Court, in reversing the case, said:

> "State courts are free to attach such descriptive labels to litigation before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata,* is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

It will be noted that the opinion and holding of the Court of Civil Appeals in this case is entirely predicated upon the theory that petitioners are concluded by the findings and judgment in the case of *State v. Humble Oil & Refining Co., supra,* which decision was an affirmance of the trial court's judgment based upon jury findings on conflicting evidence, and in which petitioners were given no opportunity to present evidence and be heard.

We recognize the rule obtaining in Texas, called doctrine of *stare decisis,* that subsequent applicants for state lands claimed to be vacant are bound by prior decisions of the Texas Supreme Court fixing boundaries which are binding upon the State, as

held in the case of *Eppenauer v. Ohio Oil Co.*, 98 Fed. (2d) 524, which appears to have resulted from the Texas courts confusing *stare decisis* with *res judicata*, for if a judgment is binding upon the State, it would be binding upon a subsequent applicant seeking to acquire land from the State under the doctrine of *res judicata*. Prior to the decision in the case at bar, we have been unable to find a Texas case which has gone to the extent of holding that a judgment rendered on a jury's verdict upon issues of fact, like the case of *State v. Humble, supra*, in which a writ of error was refused by the Supreme Court of Texas, is binding under the doctrine of *stare decisis* upon those who were neither parties nor in privity with the judgment in that case. On the other hand, it seems to be the uniform holding of Texas courts that the doctrine of *stare decisis* has reference only to questions of law, as stated by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas in the case of *McDonald v. Humble Oil & Refining Co.*, 78 S. W. (2d) 1068.

The correct rule in Texas seems to be accurately stated in the case of *Horne v. Moody*, 146 S. W. (2d) 505, as follows:

> "As we understand the rule of *stare decisis* in this State it is one of precedent and authority. It is based upon the statement of a principle, rule or proposition of law by the Supreme Court or the highest court in the State having jurisdiction of the particular case. In a boundary suit the adoption of a particular legal proposition, such as a rule of construction, generally results in a judgment establishing a certain boun-

> dary. The doctrine of *stare decisis,* however, is based upon the legal principle or rule involved and not upon the judgment which results therefrom. In this particular *stare decisis* differs from *res judicata,* which is based upon the judgment."

Any other application of the doctrine of *stare decisis* would seem to do violence to due process.

It will be noted that the only rules or principles of law mentioned in the opinion in the case of *State v. Humble, supra,* are as follows:

> "And the cardinal rule in locating such sursurveys is to follow the footsteps of the surveyor on the ground if they can be found. If they cannot be found with certainty, all the surrounding facts and circumstances should be looked to in arriving at the purpose and intent of the surveyor, and so construed and applied as to carry into effect the most probable intent of the parties to the grant."

Had the Court of Civil Appeals applied the foregoing rules to the evidence in the case at bar, the judgment of the trial court could not possibly have been affirmed. On the other hand, the court has undertaken to extend the doctrine of *stare decisis* to what the Court said in discussing the conflicting evidence in the opinion in the case of *State v. Humble, supra,* which does not indicate the establishment of the ground location of any boundary, by law or otherwise.

What we believe to be the correct Texas rule applicable to this case was applied in the case of *Dunn v. Land,* 193 S. W. 698, in which the court said:

> "The failure of parties to introduce testimony in a case cannot affect the rights of parties claiming other lands, and in this case the rights of Dunn can not be affected by the fact that meager testimony was introduced in a case between other parties, or even by the fact, had it existed, that a jury in another case on testimony not conclusive, had found against his contention. * * * *The decision itself* (Schaefer v. Berry, 62 Texas 705) *was inadmissible, and could affect no rights of the parties in this case,* * * * and this case should be tried on the evidence introduced therein entitled to probative force, and not upon the failure of parties in another suit to adduce testimony." (Emphasis ours.)

If we are correct in the view that the refusal of the Court to consider evidence is the same in effect as denying an opportunity to be heard or denying the right to introduce evidence and have judicial findings based thereon, then the force of the evidence becomes immaterial under the holding of this Honorable Court that "To one who protests against the taking of his property, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 426.

Based upon the foregoing rule, we did not deem it necessary to encumber the record with all of the evidence, especially since respondent has never questioned the correctness of the statements contained in the petition for writ of certiorari, and regardless of what the evidence was, the Court of Civil Appeals

refused to consider it. If the decision of the Court of Civil Appeals is permitted to stand as a precedent, "certainly no man's rights can be safe under such a rule of law," as said by Justice Shaw in his dissenting opinion in the case of *Lee v. Hansberry,* 372 Ill. 369, 377, 24 N. E. (2d) 37, 41, which was reversed by this Honorable Court in *Hansberry v. Lee, supra.*

WHEREFORE, petitioners pray that this Honorable Court set aside its order denying their petition for writ of certiorari and grant a rehearing thereon and, upon such rehearing, grant their petition and issue writ of certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.

Respectfully submitted,

FRED L. WILLIAMS,
DAN MOODY,
W. P. MCCOMB,
Counsel for Petitioners.

I, counsel for the above named petitioners, do hereby certify that the foregoing peteition for rehearing of this cause is presented in good faith and not for delay.

Fred L. Williams,
Counsel for Petitioners.

FRED L. WILLIAMS,
Houston, Texas;
DAN MOODY,
Austin, Texas;
W. P. MCCOMB,
Conroe, Texas,
Attorneys for Petitioners.